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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THEODORE KANNE and BEATRIZ KANNE,
Petitioners,

vs.

CONNECTICUT GENERAL LIFE INS. CO.,
Respondent.

BRIEF FOR CALIFORNIA TRIAL LAWYERS ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONERS

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BRIEF FOR
CALIFORNIA TRIAL LAWYERS ASSOCIATION
AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF AMICUS CURIAE

The California Trial Lawyers Association ("CTLA"), founded in 1962, is a voluntary organization composed of approximately 5,000 trial lawyers who appear regularly in state and federal courts. The predominant practice of most CTLA members is the representation of injured tort victims and victims of consumer fraud.

CTLA is concerned that the Court of Appeal's interpretation of ERISA to preempt state statutory laws which expressly regulate the business of insurance and the standard which is applied to define the existence of an ERISA plan will undermine the states' ability to regulate insurance industry abuses with no corresponding federal remedy to replace it. The definitive

historical relationship between the McCarran-Ferguson Act, the Model Trade Practices Act, and the "saving" clause of ERISA, was not seriously discussed in the briefing below, nor in the opinion of the Court of Appeal below. CTLA believes that this brief will fill a much needed "gap" in the presentation to this Court as to this vital issue. Letters from counsel for Petitioner and Respondent, consenting to the filing of the brief, are filed concurrently with the Court.

PRELIMINARY STATEMENT

For the entire history of our federal nation, with the single exception of one-and-a-half years, the business of insurance has been subject to the nonuniform regulations of the various states. In 1944, however, in United States v. Southeastern

Underwriters Assn., 322 U.S. 533, 64 S.Ct. 1106, 88 L.Ed. 1440 (as will be discussed in greater detail herein), this Court abruptly reversed 75 years of contrary precedent and held that insurers were subject to federal regulation. In his dissenting opinion, Chief Justice Stone warned against "the wide ramifications of establish[ing] a new boundary between state and national power . . . ." In a separate dissent, Justice Robert Jackson argued that it was improper to nationalize insurance regulation by court decision and maintained that the long held doctrine of state regulation of insurance should be overturned by Congress and not by the courts. As discussed hereinafter, Congress reacted by passing the McCarran-Ferguson Act in 1946 to ensure that federal law does not supersede state insurance laws.

The moral of the story, for present purposes, is plain—if laws which "regulate insurance," such as the Unfair Claims Practices Act, are to be nationalized, it is for Congress to do so. To date, it has repeatedly expressed a steadfast desire not to do so.

As will be demonstrated herein, the McCarran-Ferguson Act was indeed the prototype of a state law regulating the business of insurance and served as the inspiration for the "saving" clause of ERISA.

REASONS FOR GRANTING THE PETITION

A. WHEN CONGRESS DOES NOT EXPLICITLY STATE ITS INTENT REGARDING PREEMPTION, THE COURTS SHALL DECLARE PREEMPTED STATE LAWS WHICH IMPINGE ON FEDERAL REMEDIES; THIS RULE HAS NO APPLICATION, HOWEVER, WHERE CONGRESS HAS EXPLICITLY DECLARED ITS INTENT.

The argument that the courts should infer Congressional intent to preempt state

laws which, although they regulate insurance, impinge on ERISA remedies, would make sense if Congress had not explicitly stated its intent with respect to preemption.

In Allis-Chalmers Corp. v. Lueck (1985) 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206, the Court was faced with the task of determining the preemptive effect of the Labor Management Relations Act (LMRA) with respect to a state bad faith tort claim. This task was made difficult by the failure of Congress to express its intent with respect to preemption. Thus, the Court was compelled to engage in the following analytical process (at 471 U.S. 208):

> "Congress did not state explicitly whether and to what extent it intended § 301 of the LMRA to preempt state law. In such instances courts sustain a local regulation 'unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion

of the States.' Malone v. White Motor Corp."

As the Court did not have the luxury of merely enforcing the expressed intent of Congress, it necessarily employed this "secondary" analysis in order to infer legislative intent. Here, Congress has not left its intent unarticulated. If it had failed to address the issue in ERISA, then the Court would properly be charged with determining if "a local regulation conflicts with federal law or would frustrate the federal scheme, ..." etc. However, unlike the LMRA, "Congress did . . . state explicitly whether and to what extent it intended [ERISA] to preempt state law." The Court's task is, thus, much easier, i.e., to simply follow the Congressional intent, explicitly stated. If a state law "regulates insurance" (albeit the determination of which may be difficult under

the two-tiered, three-prong test of Pilot Life Insurance Company v. Dedeaux (1987) 481 U.S. 41, 107 S.Ct. 1549), it is not preempted--so says Congress explicitly. The state insurance law may conceivably "conflict with federal law" and, absent a legislative declaration to the contrary, would be construed to be preempted by the courts, but it is nevertheless "saved" from ERISA preemption because Congress has said so. To simply ignore this express statement of intent and to employ the Allis-Chalmers "inferential intent" approach (which applies when "Congress did not state explicitly whether and to what extent it intended [legislation] to preempt state law"), makes no rational sense and does violence to the intent of Congress. Congress knew that its silence could be construed to preempt state insurance laws

under Allis-Chalmers. It chose not to remain mute. Instead, it chose to explicitly reconfirm the power of the states to regulate insurance. This goal was, apparently, more important to Congress than achieving absolute uniformity under ERISA. Wise or foolish, it was a decision properly made by the legislature and should be properly respected by the courts.

Amicus will now demonstrate that the Unfair Claims Practices Act (California Insurance Code section 790.03(h)) is a law which "regulates insurance" within the meaning of the saving clause as determined by the test of Pilot Life. The mandatory language of the saving clause thus dictates a singular result, i.e., saving from preemption.

B. THE McCARRAN-FERGUSON ACT, THE ANALYTICAL BELLWETHER OF PILOT LIFE WITH RESPECT TO WHETHER A STATE LAW "REGULATES INSURANCE" FOR THE PURPOSE OF THE ERISA SAVING CLAUSE, WAS SPECIFICALLY DESIGNED TO SAVE FROM FEDERAL PREEMPTION THE "MODEL TRADE PRACTICES" ACT UPON WHICH CALIFORNIA INSURANCE CODE SECTION 790.03 IS BASED.

1. A "Common Sense View Of The Language."

This Court, in Pilot Life Insurance Company v. Dedeaux, supra, formulated a two-part test to determine whether any particular state law "regulates insurance" within the meaning of the "saving" clause of ERISA (29 U.S.C. § 1144(b)(2)(A)) and is thereby saved from preemption under 29 U.S.C. § 1144(a). The first prong--a "common sense view of the language of the saving clause itself" (471 U.S. at 740)--is clearly satisfied in the case of the California Unfair Claims Practices Act in that the express purpose of the act is "to regu-

late trade practices in the business of insurance" (§ 790) and § 790.01 limits application of the Act to "persons engaged in the business of insurance." Thus, § 790 is "specifically directed toward that industry" as is required under Pilot Life (471 U.S. at 740) in order to come within the saving clause. See Dill v. Claims Administration Services, Inc. (1986) 178 Cal.App.3d 1184.

2. The McCarran-Ferguson "Business Of Insurance" Factors.

This second tier of analysis requires a review of the history and the case law interpreting the phrase "business of insurance" under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 et seq. The second prong is, in turn, trifurcated into the three subissues: (1) risk spreading, (2) integral part of the relationship, and (3) limited to the insurance industry.

In putting § 790.03 to the test of the three McCarran-Ferguson criteria for determining the "business of insurance," the saving clause of ERISA comes into unique historical focus with the very state law which is being measured, i.e., the Unfair Claims Practices Act. Understanding why the Pilot Life Court required such an analysis is crucial to appreciating the identity of purpose between the saving clause of ERISA and the McCarran-Ferguson Act. In a nutshell, both statutes were specifically crafted by Congress to prevent federal preemption of state laws which regulate the business of insurance. As will be discussed hereinbelow, the Model Trade Practices Law, upon which § 790.03 was based, was a specific reaction to, and an intended result of, the passage of the McCarran-Ferguson Act. Therefore, § 790.03

is virtually "per se" a law enacted for the "purpose of regulating the business of insurance" under the McCarran-Ferguson Act and is thus saved from ERISA preemption under Pilot Life as a law which "regulates insurance."

3. The History Of Federal Preemption Of State Insurance Laws Leading To The Salutary Provisions Of The McCarran-Ferguson Act.

Originating with Paul v. Virginia, 8 Wall. 168, 19 L.Ed. 357 (1869), it was assumed that insurance was not a "transaction of commerce" and was thus exempt from federal regulation under the Commerce Clause in general and from federal antitrust statutes in particular. Then, in 1944, in United States v. Southeastern Underwriters Assoc., 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440, the Court abruptly reversed itself and held that the insurance industry was subject to the Commerce Clause

and federal regulation, including antitrust laws. Deeply concerned about the inroads the court's decision might make on the tradition of state regulation of insurance, Congress reacted quickly and decisively by passing the McCarran-Ferguson Act of 1945. The stated purpose of the Act is set forth at 15 U.S.C. § 1011:

> "Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." (Emphasis added.)

The Act itself is set forth at 15 U.S.C. § 1012:

> "(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." (Emphasis added.)
>
> "(b) No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any

> State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance; provided, that after June 30, 1948, the Act of July 2, 1980, as amended, known as the Sherman Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law." (Emphasis added.)

4. This Court Recognizes The Identity Of Purpose Between The McCarran-Ferguson Act And The ERISA Saving Clause.

In Prudential Insurance Company v. Benjamin, 328 U.S. 408, 66 S.Ct. 1142, 90 L.Ed. 1342 (1946), the Court commented as follows:

> "Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance."

In nearly identical fashion, Congress drafted the saving clause in ERISA so that "nothing in this subchapter shall

be construed to exempt or relieve any person from any law of any State which regulates insurance . . . ." 29 U.S.C. § 1144(b)(2)(A).

Under the McCarran-Ferguson Act, there is no generalized federal preemption because, although insurance is now subject to the commerce clause and the possibility of federal regulation, the business of insurance is still subject to state laws which regulate the business of insurance and no federal law will be construed to preempt any state law which "regulates the business of insurance" unless the federal law specifically relates to the business of insurance. Thus, in one sense, the saving clause of ERISA does no more than what the McCarran-Ferguson Act requires in any event; that is, since ERISA itself does not "specifically relate to the business

of insurance," it may not be construed to preempt state laws which regulate the business of insurance.

This Court gave explicit recognition to the identity of purpose between the ERISA saving clause and the McCarran-Ferguson Act in Metropolitan Life Ins. Co. v. Massachusetts (1985) 471 U.S. 724, 105 S.Ct. 2380, which was cited with approval and relied on in Pilot Life. After quoting from the McCarran-Ferguson Act, the court stated as follows: "The ERISA saving clause, with its similarly worded protection of 'any law of any State which regulates insurance,' appears to have been designed to preserve the McCarran-Ferguson Act's reservation of the business of insurance to the States. The saving clause and the McCarran-Ferguson Act serve the same federal policy and utilize similar language

to define what is left to the States." (Emphasis added.) Moreover, ERISA specifically provides that none of its provisions shall be construed to supersede any pre-existing federal statute. 29 U.S.C. § 1144(d). The McCarran-Ferguson Act is such a pre-existing federal statute. (See Metropolitan Life Insurance Co. v. Massachusetts, supra.) This reasoning process was again recognized and applied by the Court in Pilot Life, supra.

5. The Circumstances Under Which The McCarran-Ferguson Act Was Passed, And The State Legislative Response Thereto, Definitively Demonstrate Congressional Intent Not To Preempt The Model Trade Practices Act Upon Which Section 790.03(h) Is Based.

Most significant to a determination of the present issue (i.e., whether Insurance Code § 790.03 is a law regulating insurance and thus saved from ERISA preemption) is the historical response to the "proviso" of subsection (b) of the Act.

The states were given three years to pass laws which "regulate the business of insurance" in order to avoid preemption by the federal antitrust and Federal Trade Commission laws. In response, the states flurried to pass a series of laws regulating the business of insurance pursuant to the McCarran-Ferguson Act. One of the foremost efforts was the adoption by the National Association of Insurance Commissioners (NAIC)--the very organization which sponsored the McCarran-Ferguson Act[1]--of the Model Trade Practices Act from which the Model Unfair Claims Practices Act was

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[1]See House Report No. 143 (February 13, 1945), U.S. Congressional Service, 79th Cong., 1st Sess. "The views of the NAIC are particularly significant because the Act ultimately passed was based in large part on the NAIC bill." Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. at 221, 99 S.Ct. at 1078.

derived.[2] California adopted the Model Trade Practices Act and Model Unfair Claims Practices Act by enacting Insurance Code §§ 790, et seq. (See NAIC Model Regulation Service — July 1986, showing that all 50 states had adopted the model or similar legislation.)[3]

In dramatic fashion, § 790 expressly states—using the language of the Model Act—that it was enacted as a law to regulate the business of insurance under the McCarran-Ferguson Act: "The purpose

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[2]See 12 William Mitchell Law Review at 49-51 (1985).

[3]"To avoid the loss of state regulatory authority to the Federal Trade Commission, state regulators and the insurance industry jointly sponsored legislation preserving the powers of the state commissioners to regulate the business of insurance. The National Association of Insurance Commissioners (NAIC) developed the Model Fair Trade Practices Law for that purpose, which was quickly adopted by the majority of states." 12 Wm. Mitchell L.Rev. at 50 (1985).

of this article is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, 79th Cong.) [i.e., the McCarran-Ferguson Act], by defining, or providing for the determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined." (Emphasis added.)

Could there ever be a more explicit example of a state law which regulates the "business of insurance" under the McCarran-Ferguson Act and, thereby, must be considered a "law regulating insurance" and saved from ERISA preemption under Pilot life? Unlike the common law tort of bad faith in Mississippi which can arise out of a breach

of contract and which, under Pilot Life, is not a law which regulates insurance under the McCarran-Ferguson Act, California Insurance Code §§ 790 et seq. were specifically and expressly enacted as a law regulating insurance under the McCarran-Ferguson Act.

6. Congressional Intent To Save State Laws Regulating Insurance From Preemption By ERISA Was Reaffirmed By Congress After Enactment Of ERISA When Congress Amended The Federal Trade Commission Act In 1980.

The Congressional approval of free and unfettered state regulation of insurance was reaffirmed unequivocally when Congress in 1980 amended the Federal Trade Commission Act. (15 U.S.C. § 46, subd. (h), hereinafter FTC Act 1980 Amendment.) This amendment, made after the passage of ERISA, is of great importance in deciding the preemptive scope of ERISA for three distinct reasons:

First, the conference report on the FTC Act 1980 Amendment stated as follows: "[T]he conferees wish to indicate their strong reaffirmation of the basic policy of the McCarran-Ferguson Act: That the business of insurance is to be regulated by the States." (House Conf. Rpt., 1980 U.S.C. Cong. & Adm. News 1144; see also explanation of report in the Senate, 126 Cong. Rec. 11916, col. 1.)

Second, the legislative history of the FTC Act 1980 Amendment reveals not only that Congress desires unimpeded state regulation of insurance, but that Congress also considers the Unfair Practices Acts to be important vehicles for state control over the business of insurance. (See, e.g., comments of Sen. Durkin, 126 Cong. Rec. 2369.) Senator Metzenbaum expressed concern that all states had not adopted laws

which included "systematic procedures to determine whether insurance consumers are being rated properly with respect to such matters as claims payment . . . ." but nonetheless felt that the states should retain control over insurance regulation. (126 Cong. Rec. 2374.) Senator Durkin concluded that there is "the potential for being a much stronger regulatory system when you have 54 commissioners trying different ways to improve regulations . . . ." than when the federal government steps in. (126 Cong. Rec. 2376.) These comments confirm Justice Rehnquist's conclusion in Union Labor Life Ins. Co. v. Pireno, 102 S.Ct. 3002, 458 U.S. 117 at 136-138 (1982), that claims adjustment is at the heart of the business of insurance, and that it is a matter to be regulated by the states.

Third, and most important, the Congressional stand on state supremacy in insurance regulation manifested in the legislative history of the FTC Act 1980 Amendment amplifies the conclusion that Congress does not intend for ERISA (nor any other of its enactments) to be construed or interpreted in any way that disrupts state regulation of the business of insurance assured by the McCarran-Ferguson Act.

C. ANY NONUNIFORMITY IN REMEDIES AVAILABLE TO INSUREDS UNDER ERISA PLANS THROUGHOUT THE FIFTY STATES IS A FUNCTION OF THE EXISTENCE OF THE SAVING CLAUSE—NOT ITS INTERPRETATION; PERFECT UNIFORMITY CAN BE ACHIEVED ONLY BY REWRITING THE SAVING CLAUSE.

The additional concern of the Court in Pilot Life for "the role of the saving clause in ERISA as a whole" and "remedies under state law that Congress rejected in ERISA," when applied to state bad faith tort laws of general application, must be

reconciled with its conclusion two years earlier in Metropolitan Life Ins. Co. v. Massachusetts, supra, as applied to a state statutory regulation applicable only to the insurance industry. In Metropolitan Life, the Court stated as follows:

> "[W]hile the general preemption clause broadly preempts state laws, the saving clause appears broadly to preserve the States' lawmaking power over much of the same regulations." (Emphasis added.)
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> * * *
>
> "We must also presume that Congress did not intend to preempt areas of traditional state regulation." (Emphasis added.)
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> * * *
>
> "The presumption is against preemption and we are not inclined to read limitations into federal statutes in order to enlarge their preemptive scope."
>
> * * *
>
> "We therefore decline to impose any limitation on the saving clause beyond those Congress imposed in the clause itself and in the 'deemer clause' which modified it. If a state law 'regulates insurance,' it is not preempted. Nothing in the language, structure,

> or legislative history of the Act supports a more narrow reading of the clause, whether it be the Supreme Judicial Court's attempt to save only state regulations unrelated to the substantive provisions of ERISA, or the insurer's more speculative attempt to read the saving clause out of the statute." (Emphasis added.)

* * *

The insurance industries' argument that § 790.03 should be preempted because, otherwise, insured and self-funded plans would be subjected to potentially disparate regulation, has already been rejected by the Court. In Metropolitan Life Ins. Co. v. Massachusetts, supra, the Court stated as follows:

> "We are aware that our decision results in a distinction between insured and uninsured plans, leaving the former open to indirect regulation while the latter are not. By so doing, we merely give life to a distinction created by Congress in the 'deemer clause,' a distinction Congress is aware of and one it has chosen not to alter. We also are aware that appellant's construction of the statute would

> eliminate some of the disuniformities currently facing national plans that enter into local markets to purchase insurance. Such disuniformities, however, address the inevitable result of the congressional decision to 'save' local insurance regulation. Arguments as to the wisdom of these policy choices must be directed at Congress." (Emphasis added.)

In Metropolitan Life Ins. Co. v. Massachusetts, supra, 471 U.S. at 746, the Court specifically rejected a "conflict" interpretation of the "saving" clause, i.e., that only state laws which did not directly conflict with the substantive provisions of ERISA were saved from preemption. The Court, instead, held that the "saving" clause of ERISA meant precisely what it says, i.e., that a state law regulating insurance is simply not preempted. Thus, the contention that the remedial provisions of ERISA have some sort of uncodified and unexpressed preemptive effect independent

of the "saving" clause, is meritless. Moreover, any such construction of ERISA would be contrary to 29 U.S.C. § 1144(d) which precludes interpretation of ERISA as to supersede any pre-existing federal legislation including McCarran-Ferguson which precludes federal preemption of state laws regulating insurance.

It was Congress' desire to provide for uniformity of laws applicable to employee benefit plans—not insurers. Employee benefit plans are not engaged in the business of insurance, even when they are self-funded and look and act like insurers. Analogously, insurance policies and the insurers that issue the policies are not employee benefit plans. (HCR. Rep. No. 1785, 94th Cong. 2d Sess. 48 (1976).)

The legislative history of the McCarran-Ferguson Act, amplified and reaffirmed

in the legislative history of the FTC Act 1980 Amendment, as well as in the Metropolitan Life decision, reveals that Congress fully endorses disuniformity in the various states' separate systems of the regulation of the business of insurance, and that the McCarran-Ferguson Act was passed to preserve the states' right to pass varying laws regulating the business of insurance. "Every state in this Union built up a code of laws and established a commission or committee of some kind to handle insurance in accordance with what they thought were the needs of their particular state." (90 Cong. Rec. 6535.) "If the states are to be permitted to regulate, each of them should be permitted to regulate as it sees fit." (90 Cong. Rec. 6536; see, e.g., 90 Cong. Rec. 6550, 6554; 126 Cong. Rec. 2376, 11915.)

This Court, on more than one occasion, has recognized that Congress accepts the disuniformity of laws regulating insurance which naturally flows from the McCarran-Ferguson Act. "Moreover, in taking this action [enacting the McCarran-Ferguson Act] Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed . . . Congress intended to declare, and in effect declared, that uniformity of regulation . . . are not required in reference to the business of insurance by the national public interest, except in the specific respects otherwise expressly provided for." (Prudential Ins. Co. v. Benjamin (1945) 328 U.S. 408 at 429-431.)

In enacting ERISA, Congress demonstrated that the need for state supremacy in insurance matters, and Congress' tolerance of disuniformity in the regulation of insurance, outweighed Congress' desire to provide uniform regulation of insurers that provided insurance benefits through ERISA plans. This conclusion is especially compelling since the legislative history of ERISA reveals that Congress never considered an insurance policy purchased by a plan to be the functional equivalent of the

plan itself.[4]

D. AS THE COURT OF APPEAL OBSERVED, "IN LIGHT OF THE BROAD HOLDING OF PILOT LIFE, . . . THE QUESTION OF WHETHER THE POLICY HERE IS GOVERNED BY ERISA TAKES ON VITAL IMPORTANCE . . . ." — A QUESTION WHICH HAS NEVER BEFORE BEEN ANSWERED BY THIS COURT.

1. The Intolerable Inconsistency of Existing Authorities.

One of the most popular and pervasive methods of selling health and disability insurance in the United States today involves group policies sold through employers or employer groups. If such

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[4]The ERISA oversight task force on Welfare and Pension plans noted: "They [multi-employer trusts] are no more ERISA plans than is any other insurance policy sold to an employee benefit plan." (H.R. Rep. No. 1785, 94th Cong., 2d Sess. 48 (1976), often referred to as The Activity Report of the Committee on Education and Labor.) While not contemporaneous legislative history, such reports are "'virtually conclusive' as to legislative intent. Sioux Tribe v. United States, 316 U.S. 317, 319 . . . ." (Bell v. Employee Sec. Ben. Ass'n. (Kan. 1977) 437 F.Supp. 382, 393.)

marketing strategies are broadly declared to be ERISA plans, then not only will the criminal sanctions and administrative burden of ERISA proliferate in a manner unforeseen by Congress, but, when coupled with the broad preemptive effect of Pilot Life, supra, insureds will be stripped of all state-imposed protections and remedies with no corresponding federal regulation of insurance or insurers. ERISA, instead of providing "employees" with "security" as its title implies, will, ironically, provide the ultimate immunity which insurers have unsuccessfully sought from state and federal legislatures.

In rejecting the approach adopted by the Court of Appeal below and finding that the mere payment of premiums for employee health insurance is not sufficient to constitute an ERISA plan, the California

Court of Appeal noted that, otherwise, "every garden-variety employee health insurance benefit would subject the paying employer, large or small, to ERISA's regulatory burdens, and would bind the insured to ERISA's remedies." Sayble v. Blue Cross of Southern California, —— Cal.App.3d ——, 255 Cal.Rptr. 144 (Feb. 2, 1989).

Unfortunately, now that the importance of the issue of what constitutes an ERISA plan has been explosively magnified by Pilot Life, the existing authorities provide nothing which even remotely resembles a uniform approach. The Seventh Circuit believes that intent is the touchstone of an ERISA plan. Wayne Chemical v. Columbus Agency Services Corp., 567 F.2d 692 (7th Cir. 1977). The California Court of Appeal, in Rizzi v. Blue Cross of Southern California (1988) 206 Cal.App.3d 380, 253

Cal.Rptr. 541, questions this approach, while the Eleventh Circuit rejects it outright. Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982). The Eleventh Circuit test, adopted in Donovan, supra, is whether, from the surrounding circumstances, a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits." (688 F.2d at p. 1373). Under Donovan, the "bare purchase of health insurance" is evidence of an ERISA plan (id.). Yet, the Fifth Circuit held that the purchase of insurance is not a plan. Taggart Corp. v. Life & Health Benefits Admin., 617 F.2d 1208 (5th Cir. 1980), cert. den., *sub nom.*, Taggart Corp. v. Efros, 450 U.S. 1030, 101 S.Ct. 1739 (1981).

A different panel of the Ninth Circuit finds ERISA inapplicable if the employer group consists of "heterogeneous, unrelated employers." Credit Managers Assn. v. Kennesaw Life & Acc. Ins., 809 F.2d 617, 625, (9th Cir. 1987) (accord, Rizzi, supra). Here, the absence of such evidence did not prevent the application of ERISA.

Numerous courts have held that an employer association is not an "ERISA employer" under 29 U.S.C. § 1002(5), unless the evidence establishes that the individual employer played a part in the management of the employer association. See, e.g., Matthew 25 Ministries, Inc. v. Corcoran, 771 F.2d 21 (2d Cir. 1985); Donovan v. Dillingham, supra, at 1373; Hamberlin v. VIP Ins. Trust, 434 F.Supp. 1196, 1198 (D. Ariz. 1977); Baucom v. Pilot Life Ins.

Co., 674 F.Supp. 1175, 1181 (M.D. N.C. 1987); and Insurance & Prepaid Benefits Trusts v. Marshall, 90 F.R.D. 703 (C.D. Cal. 1981). The Court of Appeal below required no such evidence in order to find a plan.

The Court of Appeal below adopted and rigidified the four Department of Labor criteria as a bright-line test for determining the existence of a plan (29 C.F.R. § 2510.3-1(j) (1987) such that "any one of which would prevent the exclusion of the insurance plan from ERISA coverage (Appendix to Petition, p. D-89). Other authorities have either found ERISA inapplicable notwithstanding the absence of one or more criteria, or have contained dicta to that effect. See, e.g., Rizzi v. Blue Cross, supra; Sayble v. Blue Cross, supra; Donovan v. Dillingham, supra; Local Union

2134 UMW of America v. Powhatter Fuel (N.D. Ala. 1986) 640 F.Supp. 731, 734-735, vacated on other grounds in Local Union 2134, UMW of America v. Powhatter Fuel (11th Cir. 1987) 828 F.2d 710; and Credit Managers Assn. v. Kennesaw Life & Acc. Ins., supra, 809 F.2d at 625 (dicta).

2. The Definition Of An ERISA Plan Should Be Consistent With The Remedial Goals Of ERISA.

Amicus believes that the purposive analysis, as set forth in Rizzi, supra, and Sayble, supra, most closely and efficiently effectuates the intention of Congress in imposing uniform federal regulation. Under such an analysis, the existence of an ERISA plan depends on the extent to which the employer is involved in the administration of the benefit program so as to implicate the concerns which gave rise to ERISA (i.e., a potential for employer abuses such

as self-dealing, imprudent investing, and misappropriation of plan funds).

Nevertheless, whether this Court determines such an approach to be the "correct" one or not, this is an issue which must be decided and clarified as, in the wake of Pilot Life, the focus of national litigation regarding the state regulation of insurance which arguably is subject to ERISA, has shifted from the issue of preemption to the issue of what is an ERISA plan. As cogently understated in Rizzi v. Blue Cross, supra, the various "analytical approaches" the courts have considered "do not always coincide" (206 Cal.App.3d at p. 389, 253 Cal.Rptr. at p. 547).

CONCLUSION

The following conclusion appears to be inescapable: California Insurance Code §§ 790 et seq. were specifically enacted as a law regulating insurance under the McCarran-Ferguson Act which was sponsored by the NAIC which also sponsored the Model Unfair Claims Practices Law, and which act is, under Pilot Life, used to analyze whether a particular state law can be said to "regulate insurance" under the saving of ERISA. In other words, a brief look back into history and a simple reading of § 790 itself reveals that § 790 et seq. was not only a law regulating insurance, but was the very prototype of such a law.

In SEC v. National Securities, Inc. (1969) 393 U.S. 453, 89 S.Ct., 546, 21 L.Ed. 668, the Supreme Court stated as follows:

"The McCarran-Ferguson Act was an

> attempt to turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulations."

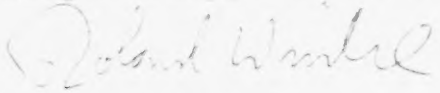
The Mississippi common law of bad faith in Pilot Life is a law of general application. The Massachusetts mandated-benefits law in Metropolitan Life and the California Unfair Claims Practices Act are laws "regulating insurance" directed exclusively toward the "business of insurance." The former is not saved from preemption. The latter is.

Moreover, and perhaps more important, if the broad preemptive force of ERISA threatens the sanctity of state regulation of the insurance industry in which principles of the McCarran-Ferguson Act, such an undesired and intrusive impact can be at least minimized by a definitive definition from this Court as to the existence

of an ERISA plan which provides insurance.

Dated: May 16, 1989.

Respectfully submitted,



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